PUBLIC PROSECUTOR v. AZIZAN BIN SALLEH AND CONNECTED CASES

[R. Cr. J. (Ajaib Singh J.) June 24, 1983]

[Ipoh – Criminal Revision Nos. 14, 15 and 16 of 1982]

Criminal Law and Procedure – Appeal – Appeal against sentence – Notice of appeal did not specify whether appeal was to the extent of the sentence or as to legality of sentence – Criminal Procedure Code (F.M.S. Cap. 6), s. 305.

In these cases the accused had pleaded guilty and were fined by the learned Magistrate. The Deputy Public Prosecutor appealed against sentence in each case but the learned Magistrate rejected all three notices of appeal as he was of the view that the notices were not properly filed as they did not specify whether the appeal was as to the extent of the sentence or as to the legality of the sentence.

Held: (1) the notices of appeal in these cases were adequate for the purpose of bringing an appeal against sentence and the notices should therefore be accepted;

(2) in future all notices of appeal against sentence should follow the provisions of section 305 of the Criminal Procedure Code and specify exactly whether such appeal is as to the extent or legality of the sentence or both.

CRIMINAL REVISION.

Ajaib Singh J.: The accused in these three cases pleaded guilty and were fined by the learned Magistrate. The Deputy Public Prosecutor appealed against sentence in each case but the learned magistrate rejected all the three notices of appeal. The learned Magistrate has written a lengthy note giving his reasons for rejecting the notices of appeal but the ground on which he actually rejected the notices appears to be that the notices did not comply with section 305 of the Criminal Procedure Code which states that when an accused person has pleaded guilty and been convicted by a magistrate on such plea there shall be no appeal except as to the extent or legality of the sentence. The learned Magistrate was of the view that the notice of appeal in each case was not properly filed because it did not specify whether the appeal was as to the extent of the sentence or whether it was as to the legality of the sentence.

The learned Magistrate certainly has a point here because a specific reference in the notice of appeal either to the extent or to the legality of the sentence would not only go for clarity but also bring to the notice of the magistrate what would be required of him to state in his grounds of decision. The question now is whether the learned Magistrate was justified in rejecting the notices of appeal in the form in which they were filed.

It is a well established practice in such cases to merely state in the notice of appeal that the appeal is against sentence without mentioning whether it is as to the extent or legality of the sentence. There has been no difficulty over this practice and there is no valid reason to denounce this practice as unacceptable. It cannot be denied that a clear form of notice specifying exactly what is appealed against would be desirable but I am of the view that the omission to so specify and merely to say in the notice of appeal that it is against sentence does not make the notice invalid. Even the official forms of the notice of appeal which are provided by the prison authorities to prisoners serving terms of imprisonment do not prescribe anything more than that the appeal is against sentence. In my view a notice of appeal in such form is adequate for the purpose of bringing an appeal against sentence under section 305 of the Criminal Procedure Code and cannot be rejected by the court. In the circumstances therefore I direct that the three notices of appeal filed by the learned Deputy Public Prosecutor be accepted and acted upon under the Criminal Procedure Code.

I would however urge that henceforth all notices of appeal against sentence should follow the provisions of section 305 of the Criminal Procedure Code and specify exactly whether such appeal is as to the extent or legality of the sentence or both.

Order accordingly.

RODIAH BTE. IBRAHIM & ANOR. v. TEOH CHIANG MENG

[O.C.J. (Mohamed Dzaiddin J.) April 11, 20 & 26, 1984]

[Penang – Civil Suit No. 188 of 1983]

Damages – Hand – Right arm – Excessive soft tissue injury – Skin graft – Loss of promotional prospect – Loss of future earnings – Loss of pension – General damages for sum of $48,766 awarded with interest.

Tort – Negligence – Road accident – Injuries – Assessment of damages – Interest on damages.

The 1st and 2nd plaintiffs sued the defendant for damages for negligent driving of his motor-lorry. The defendant admitted liability, and consent judgment had been entered in favour of the 1st plaintiff. The case concerned the assessment of the quantum of damages for the 2nd plaintiff, an army corporal aged 33 at the time of trial. As a serviceman, he would retire at 40. He suffered injuries to his right arm. There was extensive soft tissue

injury to right anti-cubital fossa with skin loss. There was laceration in his right leg. There was no fracture. Skin graft was done to his right cubital fossa ulcer. He was discharged about two months after the accident and followed with physiotherapy. The wound had then healed.

Held: (1) $20,000.00 would be a fair and reasonable amount for pain and suffering and loss of amenities;

(2) the loss of future earnings of his salary would be in the round figure of $11,500.00 based on 4 years purchase of $270.00 per month being a round figure for the difference in his present salary and the maximum salary of a staff sergeant which he would be drawing in 1991;

(3) a sum of $6,000.00 was awarded for loss of future earnings after retirement;

(4) a sum of $9,500.00 was awarded for loss of pension and $1,766.00 for loss of gratuity;

(5) special damages were agreed at $546.00;

(6) the 2nd plaintiff was therefore entitled to $48,766.00 as general damages and $546.00 as special damages with interest and costs.

Cases referred to:

(1) *Lim Eng Kay* v. *Jaafar* [1982] 2 M.L.J. 156.
(2) *Jefford* v. *Gee* [1970] 1 All E.R. 1202.

CIVIL SUIT.

Triptipal Singh Bhar for the plaintiffs.
P.R. Manecksha for the defendant.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: In this running down case both the first and second plaintiffs have sued the defendant for negligent driving of his motor-lorry registration number JY 5535 which collided into the rear of motor Vespa PE 5470 driven by Abdul Razak bin Haji Mohamad, deceased, with the second plaintiff as his pillion rider. The collision occurred along Jalan Megat Harun, Bukit Mertajam on August 15, 1980 at about 6.00 p.m.

The defendant had admitted liability. By consent, judgment was entered for the first plaintiff on behalf of herself and the dependants of Abdul Razak bin Haji Mohamad, deceased against the defendant in the sum of $17,000 as general and special damages.

In the case of second plaintiff, there was a dispute as to the quantum of damages.

On the day of the accident, the second plaintiff was an army corporal attached to 2 Company Angkut, Taiping, Perak. Now, he is attached to the Army Medical Unit at Camp Sungei Ara, Pulau Pinang holding the same rank of a corporal. He is now 33 years old and as a serviceman he will retire at the age of 40 years. I would assess general damages under the following heads:—

1. *Pain and suffering and loss of amenities.*

As a result of the accident, he suffered injuries to his right arm. There was extensive soft tissue injury to right anti-cubital fossa with skin loss. There was laceration on his right leg. There was no fracture. Skin graft was done to his right cubital fossa ulcer. He was discharged about two months after the accident and followed with physiotherapy. The wound had then healed.

On September 21, 1981 he was seen by Dr. Bell in Penang for a second opinion on the injuries. The report of Dr. Bell (Exhibit 'P5') stated as follows:—

"On Examination:

An area 3" by 5" in front of right elbow is healed by a large skin graft and covers a soft tissue deficit which involves the flexor tendons of the biceps and brachialis muscles. The nerves in the front of the elbow (median and ulna) appear to have escaped injury except for superficial cutaneous nerves to the front of the forearm. Right elbow movements are from 0 degree to 110 degrees of flexion = a deficit of 40 degrees.

Although the range of movement is adequate there is a very serious loss of power in extension as well as flexion of the elbow joint.

There is no paralysis of the forearm or hand muscles but power in the hand grip and wrist is poor due to inability to fix the elbow firmly.

There is loss of tactile sensation over the front of the right forearm down to the wrist.

Conclusion: There is serious permanent disability due to injury to the attachment of the flexor muscle from the arm to the forearm at the right elbow resulting in serious loss of power in the whole right arm.

Patient is unable to lift or carry heavy weights with the right hand and there is loss of dexterity in the limb."

Dr. Bell was called to testify for the second plaintiff. He stated that the power of the second plaintiff's arm was grade 3 as compared to grade 5 (full power). However, under cross-examination he agreed with defendant's counsel that the only disability was that he would not be able to use his right hand to do heavy work. He had to get his right arm supported before being able to use his right hand to write. The dexterity was good. Having heard this evidence and on observing the

second plaintiff, I am satisfied that although there was serious disability to his right arm, the second plaintiff with the aid of his left hand could still use his right hand e.g. writing. Therefore, based on the authorities referred to me by Mr. Paul Manecksha, in my judgment the sum of $20,000 would be a fair and reasonable amount to compensate the second plaintiff in the circumstances of this case.

2. *Loss of future earnings.*

As for this heading, damages would be for the probable loss of promotional prospect.

The plaintiff was a corporal at the time of the accident on August 15, 1980. He was promoted to the present rank on March 1, 1977. It was established in evidence that he had to pass the army clerical examination and the regimental training course before being eligible for consideration for promotion. The plaintiff had stated that he was selected to attend the regimental training course in 1979 but had opted to attend in 1980. He said that in the normal circumstances he was due for promotion to the rank of a sergeant in 1981. Again in my opinion, there was no guarantee that he would be promoted a year after attending the regimental training course had it not been for the accident. For reasons known to himself, the plaintiff appeared to be very confident that he would have reached to the top of the junior officers' rank of Warrant Officer One had it not been for the accident. A letter from the Commanding Officer ('FAB 2') dated January 10, 1981 in reply to his counsel fortified his assertion to the extent that there was no reason why he could not be considered for promotion to the rank of Warrant Officer One had he been fit. That was all what was said. Then, we have the evidence of Major Dr. Omar (P.W.2), the present superior officer of the second plaintiff. He stated that he found the second plaintiff to be above average in his work. He was of the opinion that had the plaintiff attended the regimental course he would be a staff sergeant by now.

Based on the evidence and submission of counsel, in my opinion, on the balance of probability the highest rank he would have reached would be a staff sergeant. I cannot agree with the submission of his counsel that I should assess the prospect of plaintiff's future income on the basis that he would become a Warrant Officer One at the time of his retirement. To me that was only a possibility. In the circumstances, I would assess the plaintiff's loss of future income on the basis that he would earn the salary of a staff sergeant at the time of his retirement in 1991.

The method of calculation would be on the basis of multiplicant (representing income) times the years' purchase (see: *Lim Eng Kay* v. *Jaafar*[1]). On the question of years' purchase, it is not disputed that the second plaintiff has another seven years before retiring. Taking into consideration all the uncertainties of life, I think it is reasonable to fix four years as the multiplier. As for the income, I accept the calculation of Mr. Manecksha of $270 being a round figure for the difference in his present salary and the maximum salary of a staff sergeant which he would only be drawing in 1991. Therefore, based on the annuity table, his loss of future earnings of his salary would be in the round figure of $11,500.

3. *Loss of future earnings after retirement.*

First, what would be his expectation of working life from the time of his retirement. In this case, we know as a fact that the second plaintiff will retire at the age of 40 years. He is a healthy young man and I am quite sure he would be able to continue working until the age of 60 years. It is common knowledge that members of the Armed Forces are provided with pre-retirement training to enable them to seek employment after their retirement from the army. Therefore, the issue here is how much would he be able to earn after the age of 40 years when he leaves the army. Then, after ascertaining the amount, the next question is how much would his future loss be by way of a reduction in his earning capacity because of his hand injury? In my opinion, this would certainly be a difficult, if not, futile exercise to go into because we cannot in the circumstances of this case say the type of job he would be getting, if anything, after his retirement. It would merely be a guesswork. I could only say, in all probability there might be a reduction in his earning capacity due to this injury to entitle him to some damages. In the circumstances I would award $6,000 under this heading.

4. *Loss of pension and gratuity.*

It is established that the difference in the pension between a corporal and a staff sergeant is $105. The second plaintiff could only be entitled to his pension when he retires at 40 which would be another seven years from today. In all

probability, he would continue to receive the pension until the age of 60 years. I think a multiplier of ten years would be fair and reasonable and in the circumstances I award $9,500 being his future loss of pension.

As for gratuity, the difference is $2,646 and in view of the fact that he would be entitled when he retires in 1991 and subject to contingencies I would deduct one-third from the amount, thus making it $1,766.

5. *Special damages.*

This was agreed at $546.

6 *Interest.*

Following the principle in *Jefford* v. *Gee*[2], I award interest for general damages for pain and suffering and loss of amenities at eight per cent per annum from date of service of writ and four per cent per annum on special damages from date of accident.

In my judgment, the second plaintiff is therefore entitled to $48,766 as general damages and $546 as special damages with interest and costs.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; V.P. Nathan & Partners.*

JEMCO SDN. BHD. v. ANDREW LIAU KA LIENG & ORS.

[O.C.J. (Charles Ho J.), May 21, 1984]
[Kota Kinabalu – Civil Suit No. S28 of 1982]

Partnership law – One partner acknowledging debt after retirement of his three partners – Whether retired partners affected – Limitation Ordinance, Sabah – Partnership Act 1961, ss. 38(2), 39 & 40.

The four defendants were partners of a firm trading under the name and style of Syarikat Universal Parts Services ("the firm"). The firm owed the plaintiffs a sum of money for goods supplied by the plaintiffs in 1978. The 1st defendant tendered 14 cheques issued in the name of the firm to the plaintiffs to settle the debt by instalments, and one of the cheques was paid on November 14, 1979. About a year before the 14 cheques were handed over to the plaintiffs, the 2nd, 3rd, and 4th defendants had retired from the firm. The present action was commenced on February 22, 1982, more than three years after the cause of action arose. The limitation period was three years. It was common ground that had it not been for the rendering of the cheques and the cashing of one of them, the action against all the 4 defendants would have been statute-barred. Judgment was entered against the 1st defendant by default of appearance. The 2nd, 3rd, and 4th defendants contended that the act of acknowledgment of the 1st defendant could not affect them because at the time the cheques were given they were no longer partners of the firm and the act was done without their knowledge or authority.

Held: dismissing the claim against the 2nd, 3rd, and 4th defendants: since oral notice of the retirements of the 2nd, 3rd, and 4th defendants had in fact been given to the representative of the plaintiffs at or before the time when the 14 cheques were handed over to him, the act of acknowledgment by the 1st defendant did not affect the other three defendants.

Cases referred to:

(1) *Tan Boon Cheo* v. *Ho Hong Bank Ltd.* [1934] M.L.J. 180.
(2) *Tucker* v. *Tucker* [1894] 3 Ch. 429.

CIVIL SUIT.

Cecil Ian Robertson for the plaintiffs.
Edwin Tsen for the 2nd, 3rd & 4th defendants.

Cur. Adv. Vult.

Charles Ho J.: The Plaintiffs in this action claim against the defendants as the acceptor of two bills of exchange which, upon being presented for payment, were dishonoured. The two bills of exchange dated June 29, 1978, and July 24, 1978, respectively were for the sums of M$ 22,380.75 and M$52,750.87 respectively.

The facts which are not in dispute are simple. The four defendants were partners of a firm and were all trading under the name and style of Syarikat Universal Parts Services (hereinafter called the firm). The Plaintiffs, Jemco International Sdn. Bhd. started dealing with the firm in January 1978 by supplying the firm hydraulic hoses and other goods. The firm paid for the goods supplied under the first few shipments but failed to do so in respect of subsequent shipments and the account showed the firm owing the plaintiffs a sum of $68,228.78. Though this action is based on the two bills of exchange both parties however agreed at the hearing that should the plaintiffs succeed in this action the judgment should be for the sum shown on account and not the amounts shown on the two bills. The two bills of exchange were issued on July 24, 1978 and June 29, 1978 respectively and were accepted by the firm. Upon being duly presented for payment they were dishonoured